



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 207 OF 2017
DANIEL MORARA MOMANYICLAIMANT
v
KISUMU WATER & SEWERAGE CO LTD...RESPONDENT

JUDGMENT

1. The Issues for determination in this Cause as identified by Daniel Morara Momanyi (the Claimant) through his submissions filed in Court on 24 November 2020 are

- i. Whether the grounds for terminating the Claimant (sic) are valid under the provisions of the Employment Act, 2007?
- ii. Whether the Claimant is entitled to the reliefs sought?

Unfair termination of employment

2. The Claimant was employed Kisumu Water Sewerage & Co. Ltd (the Respondent) on a fixed-term contract in 2009.
3. The contract(s) was renewed severally, and the last signed contract produced in Court was dated 1 April 2016 and was to lapse on 30 June 2016.
4. In the Memorandum of Claim, the Claimant set out the date of termination of employment as 9 November 2016, which he repeated during cross-examination.
5. The Claimant challenged the fairness of the termination of the contract on the ground that applicable procedures were not followed and that there was no disciplinary hearing.
6. Section 35(1)(c) of the Employment Act, 2007 contemplates written notice of termination of employment. None was produced in Court.
7. At the same time, section 41 of the Act envisages a hearing.
8. The hearing may take the nature of correspondence (show-cause and written response by the employee) or a face to face hearing (depending on the circumstances of the case) or a combination of both.
9. The Claimant's evidence that procedures were not followed and that there was no disciplinary hearing was not controverted or rebutted by the Respondent as the Respondent did not lead any evidence.
10. The Claimant discharged the burden expected of him by section 47(5) of the Employment Act, 2007.
11. Unfortunately, the Respondent did not produce any evidence during the hearing of its case on 16 November 2020 to discharge the burden expected of it by sections 41, 43, 45 and 47(5) of the Act.
12. In the circumstances, Court finds that the Claimant's employment was terminated unfairly on 9 November 2016.

Compensation and pay in lieu of notice

13. The Claimant served the Respondent as a plumber for eight years and in consideration of the length of service, the Court is of the view that the equivalent of 8-months gross wages as compensation would be appropriate.

14. Since the Respondent did not give written notice, the Court will allow the equivalent of 1-month basic salary in lieu of notice.

Breach of contract

Service pay/gratuity

15. The Claimant sought Kshs 153,000/- which he said was the equivalent of 1-month salary for every year worked but he did not state whether it was *service pay* or gratuity.

16. If the Claimant sought the amount on account of *service pay* as envisaged by section 35(5) & (6) of the Employment Act, 2007, he would not be eligible for the same as he produced evidence of his membership of the National Social Security Fund.

17. If the amount was due on account of gratuity in terms of the contract, there was no disclosure as to which clause of the contract provided for payment of gratuity.

18. Relief is declined.

Overtime

19. The Claimant did not lead any foundational evidence to show when he worked overtime. In the witness statement, the Claimant stated that he used to work up to 7.00 pm every day but did not disclose the time he would report to work.

20. The relief of the Kshs 594,000/- claimed is declined.

Accrued leave

21. On account of untaken leave by the time of separation, the Claimant pleaded for Kshs 352,000/- spread over the eight years of service.

22. Section 28(4) of the Employment Act, 2007 circumscribes the length of accrued annual leave, which can be carried forward.

23. The Claimant did not disclose whether he carried his leave days with the permission of the Respondent or whether he sought for leave and was declined. Again relief is declined.

November 2016 wages

24. The Claimant is entitled as of right to earned wages up to the date of separation, and the Court will allow the head of the claim in the sum of Kshs 6,000/- as pleaded.

Conclusion and Orders

25. The Court finds that the Claimant has proved that the termination of his employment was unfair and awards him

(a) Compensation Kshs 124,400/-

(b) Pay in lieu of notice Kshs 15,550/-

(c) November 2016 wages Kshs 6,000/-

TOTAL **Kshs 145,950/-**

26. The Claimant to have costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mr. Yogo instructed by Otieno, Yogo, Ojuro & Co. Advocates

For Respondent Mr. Ouma/Mr. Oduor instructed by Ouma Njoga & Co. Advocates

Court Assistant Chrispo Aura